No. 80-1588

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In the Supreme Court of the United States

OCTOBER TERM, 1980

RONALD JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court erred in permitting a government witness to testify that he had pleaded guilty to a charge related to those on which petitioner was convicted.

2. Whether the court of appeals acted improperly in affirming the district court's denial of petitioner's request to examine certain government files without first examining those files itself.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1980. A petition for rehearing was denied on February 6, 1981 (Pet. App. 1b-2b). The petition for a writ of certiorari was filed on March 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of unlawfully appropriating goods in interstate commerce, in violation of 18 U.S.C. 659 (Count I), breaking customs seals, in violation of 18 U.S.C. 549 (Count II), and transporting stolen property in interstate commerce, in violation of 18 U.S.C. 2314 (Count III). He was sentenced to concurrent terms of five years' imprisonment on Count I and two years' imprisonment on Count II. Imposition of sentence on Count III was suspended and petitioner was placed on five years' probation, to begin after he had served his other sentences (Pet. App. 1c-3c).

The evidence showed that on the evening of March 22, 1979, petitioner, Dennis Schoendorf, and Richard Suello stole containers of veal (valued at $93,600), and beef (valued at $36,400) from a warehouse in New Haven, Connecticut (Tr. 54, 56-58, 67-69, 78-79, 103, 117, 123-124, 139-142).[1] The containers had been shipped from New Zealand to New Jersey, where they were placed under seal by the United States Customs Service, and then transported to the New Haven warehouse (Tr. 8-52, 54, 58, 74-75, 78). Several days later petitioner attempted to arrange a sale of the meat to an FBI undercover agent posing as a trafficker in stolen goods (Tr. 412-414, 455-460). Petitioner provided the agent with a sample of the veal, then broke off negotiations without explanation (Tr. 374-376, 461-464). That evening Suello and Schoendorf transported a trailer containing the veal to New Jersey (Tr. 179-183, 186-191),

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[1] Schoendorf was tried with petitioner and convicted on the same charges. He has filed a separate petition for a writ of certiorari, No. 80-1788.

where, several days later, federal agents arrested Suello and seized the trailer (Tr. 199-200). The following day, federal agents discovered and seized the trailer containing the stolen beef, which had remained in Connecticut. Petitioner, apparently unaware of this, made arrangements to sell the beef to the undercover agent and to deliver it to Buffalo, New York (Tr. 350-358, 362-363, 376-380, 423, 425, 468-476).

1. Suello testified for the government against petitioner. At the beginning of Suello's testimony, the government established that he had been convicted on two counts of larceny in state courts (Tr. 125) and had been charged with possession of marijuana with intent to distribute, a charge that was still pending (*ibid.*). A defense objection that the government was impeaching its own witness was overruled (Tr. 124). The government then elicited that Suello was "arrested in connection with this case * * * down in New Jersey" and that after his arrest he had "pled guilty to conspiracy" pursuant to an agreement with the government (Tr. 126-128). Petitioner unsuccessfully objected to this testimony on the ground that it was "hearsay" (Tr. 126, 127). Suello testified that he had completed a term of six months' confinement on the conspiracy charge (Tr. 129). In response to the government's questions, Suello then described his agreement with the government (Tr. 128);[2] he stated that there was no con-

[2] In exchange for dismissal of all other charges and return of the seized tractor-trailer to a creditor who held a security interest in it, Suello was to plead guilty and "cooperate and tell of my participation in" the theft of the meat (Tr. 128) in the New Jersey case (Tr. 210). The government did not agree to recommend a sentence (Tr. 129).

nection between his plea agreement in New Jersey and his testimony against petitioner and that the government had not promised him anything in return for his testimony against petitioner (Tr. 210).

Petitioner's counsel cross-examined Suello at length about his plea agreement with the government, repeatedly attempting to elicit from Suello the admission that he had fabricated his testimony in order to escape the additional imprisonment with which the government could have threatened him (*e.g.*, Tr. 243, 279). In this connection, petitioner's counsel attempted to establish that Suello might have been convicted of theft of goods in interstate commerce, interstate transportation of stolen property, and breaking a customs seal (Tr. 245)—the three offenses of which petitioner was convicted. Suello denied that he was guilty of breaking a customs seal (*ibid.*). By asking questions that the district judge held were improper, petitioner's counsel also made it known to the jury that the defendant against whom Suello testified in New Jersey was acquitted (Tr. 216, 248).

At one point, while the jury was absent, petitioner's attorney expanded on his objection to the government's questions. The court's ruling, he said, "allow[ed] the Government to introduce evidence discrediting its own witness on direct; evidence, in other words, of a prior inconsistent statement. * * * It was hearsay, and it is an effort to discredit a witness by out-of-court statements * * *. That's why I objected to it * * *" (Tr. 287). The government's attorney replied: "[I]t is the Government's position [that] we have a responsibility to bring out, ourselves, if we can, the background of a witness, particularly if that background goes to his credibility. * * * [The members of the] jury * * * feel as though they have

a right to the full background of the individual * * *" (Tr. 288). The judge again overruled petitioner's objection and immediately asked petitioner's attorney if he wished to suggest any instructions for the jury (*ibid.*). Neither then nor at any other time did petitioner suggest that the judge should instruct the jury as to limitations on the use to which Suello's testimony about his guilty plea could be put.

In their summations, government attorneys mentioned Suello's guilty plea only once (Tr. 839);[3] their clear purpose was to emphasize that Suello had been given "no promises" (Tr. 840) in return for his testimony. The government did not argue that Suello's guilty plea was in some way evidence of petitioner's guilt. By contrast, petitioner's counsel began his closing argument by saying that the government's case was "Richard Suello and nothing else" (Tr. 845). He concluded his summation by saying, "So what this case boils down to, Ladies and Gentlemen, is do you buy Richard Suello beyond a reasonable doubt * * *" (Tr. 860). Much of his argument was an attack on Suello's credibility. He suggested repeatedly that Suello's testimony was the result of a "deal" with the government (Tr. 849-853). Petitioner's counsel also cited Suello's denial that he had broken the customs seals as evidence that petitioner was not guilty of that offense (Tr. 846).

2. Robert Proto, who had been a government informant for two years (Tr. 401-404) and had been

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[3] At another point in his summation a government attorney said that Suello "admitted his involvement" (Tr. 829). But the attorney was recounting the details of Suello's testimony, and the context makes it plain that he was referring to admissions made during that testimony, not to Suello's guilty plea.

in the government's Witness Protection Program at one time (Tr. 430-431, 434), testified about petitioner's efforts to sell the stolen meat (Tr. 406-427). Petitioner was given some information from the government's file on Proto, including a summary of an interview between Proto and the undercover agent who negotiated with petitioner over the sale of the stolen meat (Tr. 429-430). After Proto's direct testimony, however, petitioner asked for "the records in the possession of the Government concerning [Proto's] prior work for the Government" (Tr. 429) and "all of its records concerning in any way the delivery of benefits of whatever kind, whether pecuniary, material, or otherwise, to this witness" (Tr. 446). Petitioner's counsel explained: "[T]he Government did credit this man by putting on evidence that he had worked for them in other cases and testified elsewhere * * *. I think, since the Government has done that, that under the Jencks rule I am entitled to have, at least within reasonable limits, his history" (Tr. 436). He added that his cross-examination of Proto would be aided if he could suggest "a pecuniary motive to lie" (Tr. 446). The judge then said to the government attorney: "In the interests of safety, I think the best thing you can do is to turn over all documents you have relating to Mr. Proto, at least commencing * * * when he became a Government informant, for in camera inspection" (Tr. 450). After examining the documents the judge found "nothing under any theory that I am aware of * * * which is producible * * * and not otherwise produced" (Tr. 583-584). The documents were sealed, marked as court exhibits, and returned to the custody of the government (Tr. 788-790).

3. Petitioner appealed his convictions. The government informed the court of appeals that the documents were available for inspection but that the government wished to retain custody of them; it offered to deliver the documents to the court of appeals by hand on the understanding that they would be returned to the government immediately after the court had concluded its inspection.[4] Petitioner moved that the documents be transferred to the court of appeals. Without acting on his motion, the court affirmed petitioner's conviction (Pet. App. 1a-8a), holding that the district court did not err in refusing to disclose the government's file on Proto. The court said: "Defense counsel offered little beyond conclusory statements to support their claim that the file contained material which might impeach the witness so as to affect the outcome of the trial * * *. We decline to disturb the trial judge's determination that the material in the file would not have affected the outcome" (Pet. App. 6a). The court also held that "the government was entirely within its rights and indeed was required to make * * * disclosure" of Suello's guilty plea (Pet. App. 5a).

Some time after its decision, the court granted petitioner's motion to transmit the sealed documents. In his petition for rehearing petitioner asked the court to examine those documents (Pet. 19). On February 6, 1981, the court of appeals denied rehearing (Pet. App. 1b-2b).

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[4] These facts appear not to be in the record; we have learned them from the Assistant United States Attorney who represented the government in the court of appeals.

ARGUMENT

1. Petitioner contends (Pet. 13-18) that under the decisions of this Court and several courts of appeals, the district court committed plain error when it allowed Suello to testify about his guilty plea in New Jersey and did not give a limiting instruction. This contention is without merit. Suello's plea agreement with the government was clearly relevant to his credibility, as petitioner's vigorous use of it showed. The government was entitled to elicit evidence of that agreement both in order fully to inform the jury and "to prevent the defense from creating a misleading impression, or the jurors from thinking, that the Government is seeking to keep something from the jury." *United States* v. *Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969). See, *e.g.*, *United States* v. *Hasenstab*, 575 F.2d 1035, 1040 (2d Cir.), cert. denied, 439 U.S. 827 (1978); *United States* v. *Medina-Arellano*, 569 F.2d 349, 356-357 (5th Cir. 1978); *United States* v. *Wiesle*, 542 F.2d 61 (8th Cir. 1976); *United States* v. *King*, 505 F.2d 602, 605-608 (5th Cir. 1974); *United States* v. *Rothman*, 463 F.2d 488, 490 (2d Cir.), cert. denied, 409 U.S. 956 (1972). Petitioner cites *Kirby* v. *United States*, 174 U.S. 47 (1899), but that case establishes only that the government may not use one party's guilty plea as substantive evidence of an element of an offense charged against another party. Here, the government made no effort to use Suello's guilty plea in that way.

Thus the only question is whether, on the facts of this case, Suello's testimony about his guilty plea prejudiced petitioner to such a degree that petitioner's conviction must be reversed. See Fed. R. Evid. 403; *Nelson* v. *O'Neil*, 402 U.S. 622 (1971); *Harrington* v. *California*, 395 U.S. 250 (1969). For

several reasons, petitioner was not so prejudiced. First, Suello's guilty plea, by itself, did not implicate petitioner, either explicitly or implicitly. Suello testified that he had pleaded guilty to "conspiracy" in New Jersey; petitioner was not charged with conspiracy. It was petitioner's counsel who linked Suello to the specific crimes for which petitioner was convicted. Indeed, Suello denied that he was guilty of one of those offenses, and petitioner attempted to use that denial to show his own innocence. Moreover, neither the government nor the nature of the evidence suggested to the jury that because Suello was guilty petitioner had to be guilty. It is difficult even to articulate any line of reasoning the jurors might have followed in inferring petitioner's guilt from the fact of Suello's guilty plea; certainly petitioner does not articulate it. In fact, petitioner's argument was exactly the opposite: Suello's guilt, petitioner said, caused Suello to accuse petitioner unjustly in return for the government's leniency.[5]

Second, Suello was fully and vigorously cross-examined on all of his testimony about petitioner's complicity. See *Nelson* v. *O'Neil*, *supra*, 402 U.S. at 627-629; *California* v. *Green*, 399 U.S. 149, 153-164 (1970). Petitioner had ample opportunity to try to establish that Suello's admissions of guilt were false, if petitioner had wished to do so. In fact, of course, petitioner elected to emphasize Suello's guilt instead of questioning it.

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[5] The acquittal of the defendant against whom Suello testified in New Jersey—which petitioner improperly communicated to the jury—further suggested that there was no necessary connection between Suello's guilt and that of any other person charged by the government.

Finally, the actions of petitioner's counsel strongly suggest that the evidence of Suello's guilty plea did not prejudice petitioner. While petitioner's counsel described the evidence as "hearsay," he never explained how the hearsay would damage his case and never focused the judge's attention on any possibility that the evidence might suggest petitioner's guilt. Nor did counsel, despite a clear invitation, suggest a limiting instruction. In addition, Suello's guilty plea, and the government's supposed agreement with him, were central to petitioner's defense; petitioner would almost certainly have introduced evidence of Suello's guilty plea if the government had not. Under these circumstances, the court of appeals correctly concluded that Suello's testimony about his guilty plea did not warrant reversal.

There is no conflict among the circuits on this point. In *Bisaccia* v. *Attorney General*, 623 F.2d 307, 308-309 (3d Cir. 1980), and *United States* v. *Little Boy*, 578 F.2d 211, 212-213 & n.2 (8th Cir. 1978), the prosecutors argued vigorously to the jury that co-conspirators' guilty pleas, by themselves, helped demonstrate the defendants' guilt. The government made no such argument here. Indeed, in *United States* v. *Wiesle*, *supra*, a case closely analogous to the present case, the Eighth Circuit said (542 F.2d at 62-63; footnote omitted):

> When a co-defendant appears as a witness at defendant's trial, * * * [e]vidence that he entered a plea of guilty to the same offense is not error unless it is elicited as substantive proof of the defendant's guilt. Where it is introduced for other purposes, such as * * * to reflect on a witness' credibility * * * evidence of a co-defendant's guilty plea is clearly admissible. * * *

> The record does not show, nor does appellant contend, that the government, on direct examination, stressed the fact that the co-defendants here pled guilty or suggested to the jury, at any time, that it could infer defendant's guilt from their guilty pleas. To the contrary, it appears that emphasis, if any, arose from appellant's attempt to show a possible "deal" for leniency by the government. Although the trial judge failed to give an appropriate cautionary instruction, it is important to note that appellant neither requested the instruction nor objected to its absence. The admission of the guilty pleas into evidence was proper and, in light of the overwhelming evidence of guilt, the failure to give a cautionary instruction was not such plain error as to require reversal.

In contrast to the present case, the prosecution appears to have had no legitimate purpose for introducing the witnesses' convictions in *United States* v. *Vandetti*, 623 F.2d 1144, 1146-1148 (6th Cir. 1980), or guilty plea in *United States* v. *Wilcher*, 332 F.2d 117 (7th Cir. 1964). Petitioner himself quotes (Pet. 16) the passage from *Vandetti* which concludes that evidence of the convictions of others involved in a criminal scheme with the defendant was inadmissible because "[n]o other basis for offering [it was] asserted by the prosecutor" except that it tended to show the defendant's guilt (623 F.2d at 1147-1148). Neither *Vandetti*, *Wilcher*, nor *United States* v. *Harrell*, 436 F.2d 606 (5th Cir. 1970), suggests that in those cases the defense attorneys vigorously cross-examined on the basis of the guilty pleas, or made the witnesses' guilty pleas and plea bargains the centerpiece of the defense. In *Wilcher*, the court recounted the efforts of defense counsel to keep evidence of the witness's guilty plea from the jury entirely. In *Har-*

rell, the witness pleaded guilty to a conspiracy that allegedly involved the defendant and others, but attempted to make clear when he pleaded guilty that he had not conspired with the defendant. The witness testified at the defendant's trial that the defendant was not involved; the prosecutor elicited testimony about the guilty plea in a way that left "[t]he impression * * * that somehow the plea of guilty was inconsistent with [the witness's] testimony at trial * * * or worse yet, that it somehow proved [the defendant's] guilt" (436 F.2d at 614). The Fifth Circuit appeared to believe that this misleading use of the guilty plea was decisive (see *id.* at 615, 617). Thus petitioner has pointed to no authority supporting a conclusion that another circuit would reach a different result on the facts of this case.

2. Petitioner also asserts (Pet. 18-20) that the decision of the court of appeals must be reversed because that court did not expressly note that it had examined the sealed documents before rejecting petitioner's claim that the Jencks Act, 18 U.S.C. 3500, entitled him to discovery of certain of those documents. Petitioner cites no authority for this contention,[6] and for several reasons it fails.

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[6] Petitioner asserts that the court of appeals' procedure violated 18 U.S.C. 3500(c). This assertion is incorrect for at least two reasons. First, the district court's in camera review appears not to have been an inspection under Section 3500(c), "in which the Government admits that a document in its possession is a 'statement' [within the meaning of the Jencks Act] but submits the paper for the judge's *in camera* inspection to delete matter which the Government contends does not relate to the subject matter of the testimony of the witness" (*Campbell* v. *United States*, 365 U.S. 85, 93 (1961)). Instead, the district court's action was the "different" proceeding in which the government "contend[s] that a paper

First, even the district court was not obligated to examine the documents in question. The Jencks Act requires the government to disclose not all information in its files pertaining to a witness, but only "statement[s] * * * of the witness in the possession of the United States * * * relat[ing] to the subject matter as to which the witness has testified." See 18 U.S.C. 3500(b). The term "statement" is carefully defined by the Act to include only statements made by the witness and adopted or approved by him, contemporaneously recorded and "substantially verbatim recital[s]" of the witness's oral statements, and records of grand jury testimony (18 U.S.C. 3500(e)).[7] And as the Court has said (*e.g.*, *Goldberg* v. *United States*, 425 U.S. 94, 104 (1976)), one of the purposes of the act is to prevent defendants from "rov-[ing] at will through Government files" (see S. Rep.

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in its possession was not a 'statement' " (*ibid.*). Second, the government made the documents available to the court of appeals at all times after the appeal was docketed.

[7] Section 3500(e) provides:

> (e) The term "statement", as used in * * * [relevant portions of the Jencks Act] in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

No. 569, 85th Cong., 1st Sess. 3 (1957)). Consequently, as this Court has implicitly recognized (see, *e.g.*, *Goldberg* v. *United States*, *supra*, 425 U.S. at 109; *Campbell* v. *United States*, 365 U.S. 85, 92-93 (1961); *Palermo* v. *United States*, 360 U.S. 343, 354-355 (1959) (in camera examination is appropriate "when it is doubtful whether the production of a particular statement is compelled by the statute"); *Jencks* v. *United States*, 353 U.S. 657, 666 (1957)), and as several courts of appeals have held (*e.g.*, *United States* v. *Robinson*, 585 F.2d 274, 280-281 (7th Cir. 1978); *United States* v. *Nickell*, 552 F.2d 684, 689 (6th Cir. 1977), cert. denied, 436 U.S. 904 (1978)), the mere fact that government files contain information on a witness does not require a district judge to conduct an in camera search for statements that might be disclosable under the Jencks Act; the defendant has a "burden * * * to establish by probative evidence—usually on cross-examination of the witness alleged to have given a statement—that there is reason to believe that a statutory 'statement' may exist. Certainly more must be shown than a speculative possibility." *Goldberg* v. *United States*, *supra*, 425 U.S. at 124 (Powell, J., concurring).

Here, petitioner did not even assert—let alone "establish by probative evidence"—that the portions of Proto's file not disclosed to petitioner contained "statements" dealing with Proto's testimony in this case. Petitioner does not now, and did not at trial, point to anything in Proto's testimony that suggests that such statements exist. Instead, petitioner's counsel gave, as his reasons for seeking the file, his belief that Proto's "history" (Tr. 436) and evidence of the payments Proto received from the government might help impeach Proto in some general way. The district court reviewed the government's file out of an

excess of caution; it cannot have been error for the court of appeals to decline to reexamine it.

Moreover, even if the district court was obligated to examine the government's file, the court of appeals did not have to duplicate that examination in order to hold, as it did, that any failure to disclose material did not prejudice petitioner. Proto's evidence was corroborated by the testimony of the undercover agent (see Tr. 452-480). In his summation, petitioner's counsel insisted that Suello—not Proto—was the central figure in the government's case. As the court of appeals said, except for "conclusory statements" (Pet. App. 6a) petitioner has offered no explanation of why he believes that there exists material in Proto's file that the Jencks Act requires to be disclosed and that could have been significant to his defense. Thus the court of appeals, upon reviewing the evidence presented at trial, had an adequate basis for concluding that the disclosure of any Jencks Act material that might have been in Proto's file could not have altered the outcome, and the court of appeals' conclusion, based on the particular facts of the case, does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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